Alam Venture Sdn Bhd & Anor v Abdul Aziz bin Abdul Majid & Ors

FEDERAL COURT — CIVIL APPEAL NO: 01(f)-45–10 of 2013 (C)
ARIFIN ZAKARIA (CHIEF JUSTICE), ABDULL HAMID EMBONG, HASAN LAH, ZALEHA ZAHARI AND ABU SAMAH FCJJ
24 NOVEMBER 2014

Labour Law — Employment — Termination — Change of hands of hotel business — Meaning of ownership stipulated under article 2.4 of collective agreement — Whether first appellant contracted to assume rights and liabilities of second appellant — Entitlements contracted for — Whether employees should continue to remain in service — Whether first appellant successor, assignee or transferee of second appellant — Whether parties bound by collective agreement — Industrial Relations Act 1967 s 17(1)(a)

The second appellant was the registered owner of the land in Telok Chempedak Kuantan where the Hyatt Regency Hotel was erected on while the first appellant was the current registered owner of the said land and buildings. The respondents, former employees of the second appellant, claimed to have been dismissed without just cause and excuse and were represented by their union ('the union'). Due to the second appellant's financial position, it was no longer a feasible option for the second appellant to continue its hotel operations and to remain in the hotel industry. The second appellant had to sell its assets and to carry out a termination of employment exercise. Dissatisfied, the respondents proceeded to the Industrial Court and claimed that they were dismissed without just cause and excuse and sought to be reinstated without any loss of wages, allowances or privileges. The Industrial Court dismissed the respondents' claims against the appellants and held that the second appellant had terminated the services of the respondents with just cause and excuse. The respondents applied to the High Court for judicial review pursuant seeking an order of certiorari to quash the award of the Industrial Court. The respondents' application was dismissed but the decision was overturned by the Court of Appeal. The Court of Appeal ordered compensation and backwages to be paid to the respondents, in lieu of reinstatement. In the present appeal, the issues that arose for the court's determination were whether an article of a collective agreement that sought to result in the automatic transfer of employees from the present employer to another non-party of the collective agreement, without the consent of the non-party of the collective agreement and/or employees, was enforceable under the Industrial Relations Act 1967 ('the Act') and/or industrial law; and whether s 17 of the Act applied only to ensure the continuity of the terms and conditions of a collective agreement in the context

of successors, assignees or transferees or could it apply to mandate a purchaser of asset and/or business to continue to employ the former employees of the asset/business seller.

Held, dismissing the appeal with costs:

(1) As a result of the sale, the hotel business, which was the core business of the second appellant, was transferred and taken over by the first appellant. In the event of a change of ownership, the collective agreement remained valid and shall continue to apply and that all the employees shall continue to remain in service to enjoy the same entitlements as contracted for. The hotel did not cease operations after being taken over by the first appellant. The first appellant was the successor, assignee or transferee of the second appellant in the context of s 17(1)(a) of the Act. Thus, the first appellant's contention that it was not bound by the collective agreement was without any merit. In any event and independently of s 17(1) of the Act, the first appellant which had agreed by cl 9 of the SPA to assume the rights and liabilities of the second appellant could not now say that it was not bound by the collective agreement (see paras 33, 40 & 42).

(2) The hotel business of the second appellant was transferred and taken over by the first appellant as a going concern. In a transfer as a going concern, the business remained the same but in different hands. The High Court construed article 2.4 of the collective agreement in its literal meaning when it held that the second appellant had not changed ownership and continued to exist by the same name even after selling its property to the first appellant. It did not consider the change of ownership of the hotel as a change of ownership within the meaning of article 2.4 of the collective agreement. The interpretation of article 2.4 would not be in accord with s 30(5) of the Act. The respondents, who were employees of the second appellant, were actually employed to work at the hotel which had been taken over by the first appellant. By cl 9 of the SPA, the first appellant had contracted to assume the rights and liabilities of the second appellant. There was a change of ownership within the meaning of article 2.4 of the collective agreement. Therefore, the parties were bound by it (see para 34).

[Bahasa Malaysia summary

Perayu kedua adalah pemilik berdaftar kepada tanah di Telok Chempedak Kuantan di mana hotel Hyatt Regency dibina di atasnya manakala perayu pertama adalah pemilik berdaftar terkini tanah dan bangunan tersebut. Responden-responden, pekerja terdahulu perayu kedua, mendakwa telah diberhentikan tanpa sebab dan alasan yang adil dan diwakili oleh kesatuan mereka ('kesatuan'). Disebabkan oleh kedudukan kewangan perayu kedua, ia bukanlah pilihan yang boleh dilaksanakan oleh perayu kedua untuk

meneruskan operasi hotelnya dan untuk berada dalam industri perhotelan. Perayu kedua terpaksa menjual asetnya dan menjalankan penamatan perkhidmatan pekerja. Tidak berpuas hati, responden-responden terus ke Mahkamah Perusahaan dan mendakwa mereka diberhentikan tanpa sebab dan alasan yang adil dan memohon untuk dilantik semula tanpa apa-apa kerugian gaji, elaun atau keistimewaan. Mahkamah Perusahaan menolak tuntutan responden terhadap perayu-perayu dan memutuskan bahawa perayu kedua telah menamatkan perkhidmatan responden dengan sebab dan alasan yang adil. Responden-responden memohon ke Mahkamah Tinggi untuk semakan kehakiman berikutan memohon perintah certiorari untuk membatalkan award Mahkamah Perusahaan. Permohonan responden-responden ditolak tetapi keputusan telah diterbalikkan oleh Mahkamah Rayuan. Mahkamah Rayuan memerintahkan ganti rugi dan gaji tertunggak untuk dibayar kepada responden-responden, sebagai ganti pengembalian semula. Dalam rayuan ini, isu yang timbul untuk penentuan mahkamah adalah sama ada artikel perjanjian kolektif yang dipohon yang menyebabkan pemindahan automatik pekerja daripada majikan terkini kepada lagi satu bukan pihak kepada perjanjian kolektif, tanpa kebenaran bukan pihak kepada perjanjian kolektif dan/atau pekerja, adalah boleh dilaksanakan di bawah Akta Perhubungan Perusahaan 1967 ('Akta') dan/atau undang-undang perusahaan; dan sama ada s 17 Akta terpakai hanya untuk menentukan kesinambungan terma dan syarat perjanjian kolektif dalam konteks pengganti, penyerahhak atau pemindah atau boleh diguna pakai untuk memberi mandat pembeli aset dan/atau perniagaan untuk terus menggunakan perkhidmatan pekerja terdahulu terhadap aset/perniagaan penjual.

Diputuskan, menolak rayuan dengan kos:

(1) Akibat daripada penjualan, perniagaan hotel, yang mana adalah perniagaan utama perayu kedua, telah dipindahkan dan diambil alih oleh perayu pertama. Dalam situasi pertukaran pemilik, perjanjian kolektif tetap sah dan terus terpakai dan bahawa kesemua pekerja kekal dalam perkhidmatan dan menikmati hak seperti yang dikontrakkan. Hotel tidak berhenti beroperasi selepas diambil alih oleh perayu pertana. Perayu pertama adalah pengganti, penyerahhak atau pemindah perayu kedua dalam konteks s 17(1)(a) Akta. Oleh itu, hujahan perayu pertama bahawa ia adalah terikat oleh perjanjian kolektif adalah tanpa apa-apa merit. Dalam apa-apa keadaan dan tidak bergantung kepada s 17(1) Akta, perayu pertama yang mana telah bersetuju dengan klausa 9 PJB untuk mengambil hak dan liabiliti perayu kedua tidak boleh sekarang menyatakan bahawa dia tidak terikat oleh perjanjian kolektif (lihat perenggan 33, 40 & 42).

(2) Perniagaan hotel perayu kedua dipindah milik dan diambil alih oleh perayu pertama sebagai usaha berterusan. Dalam pemindahan sebagai usaha yang berterusan, perniagaan kekal berjalan tetapi dikendalikan

oleh orang lain. Mahkamah Tinggi mentafsirkan artikel 2.4 perjanjian kolektif dalam erti literal apabila ia memutuskan bahawa perayu kedua tidak menukar milikan dan terus wujud dengn nama yang sama walaupun selepas menjual hartanahnya kepada perayu pertama. Ia tidak mempertimbangkan pertukaran pemilikan hotel sebagai pertukaran pemilikan dalam erti artikel 2.4 perjanjian kolektif. Interpretasi artikel 2.4 tidak akan seperti s 30(5) Akta. Responden-responden, yang merupakan pekerja perayu kedua, sebenarnya diambil bekerja untuk bekerja di hotel yang mana telah diambil alih oleh perayu pertama. Melalui klausa 9 PJB, perayu pertama telah mengkontrakkan untuk mengambil hak dan liabiliti perayu kedua. Terdapat pertukaran pemilikan dalam maksud artikel 2.4 perjanjian kolektif. Oleh itu, pihak-pihak adalah terikat dengannya (lihat perenggan 34).]

Notes

For cases on termination, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 1451–1464.

Cases referred to

Abdul Aziz bin Atan & 87 Ors v Rengo Malaysia Estate Sdn Bhd [1986] 2 MLJ 98; [1986] CLJ (Rep) 41, SC (refd)

Ashbridge Investments Ltd v Minister of Housing and Local Government [1965] 1 WLR 1320, CA (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)

Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira & Ors [1996] 3 MLJ 489; [1996] 4 CLJ 747, CA (refd)

Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd & Anor [2001] 3 MLJ 705; [2001] 3 CLJ 547, FC (refd)

Kesatuan Pekerja-Pekerja Perkayuan v Syarikat Jengka Sdn Bhd [1996] 3 MLJ 464; [1997] 2 CLJ 276, CA (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789, SC (refd)

Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204; [1988] 1 CLJ (Rep) 183, SC (refd)

Melon and others v Hector Powe Ltd [1981] 1 All ER 313, HL (refd)

Nadarajah & Anor v Golf Resort (M) Bhd [1992] 1 MLJ 506, HC (refd)

Non-Metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Firebricks Sdn Bhd [1976] 2 MLJ 67, FC (refd)

Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)

Tanjong Jara Beach Hotel Sdn Bhd v National Union of Hotel, Bar and Restaurant

Workers Peninsular Malaysia [2004] 4 CLJ 657, FC (refd)
Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor [2002] 3 MLJ 129; [2002] 3 CLJ 314, CA (refd)
Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and Another Appeal [1995] 2 MLJ 753, FC (refd)

Legislation referred to

Industrial Relations Act 1967 ss 17, 17(1), (1)(a), 30(5)
Rules of the High Court 1980 O 53

Appeal from: Civil Appeal No C-01–560 of 2010 (Court of Appeal, Putrajaya)

Thavalingam Thavarajah (Raymond TC Low, Shaik Azrin Shaik Daud and Vinu Kamalanatham with him) (Lee Hishamuddin Allen & Gledhill) for the appellants.
Ambiga Sreenevasan (Shireen Selvaratnam and Mohd Azri bin Mohd Ghazali with her) (Sreenevasan) for the respondents.

Abu Samah FCJ:

[1] This appeal has its origin in the Industrial Court. Kuantan Beach Hotel Sdn Bhd ('the second appellant') was the registered owner of the land in Telok Chempedak Kuantan where the hotel, known as Hyatt Regency Kuantan is situated. Alam Venture Sdn Bhd ('the first appellant') is the current registered owner of the said land having purchased them together with the buidings thereon and all the assets from the second appellant. The respondents were former employees of the second appellant, who claimed to have been dismissed without just cause or excuse.

[2] The second appellant was then facing financial difficulty. Its land on which the hotel is sited on had been subjected to foreclosure proceedings. Its shareholder, Pasdec Resources Sdn Bhd had been wound up. Thus on 25 April 2005 it executed a sale and purchase agreement ('SPA') with the first appellant to sell its land and assets to the latter. Some of the terms of the SPA were later varied by way of two supplemental sale and purchase agreements executed between the parties, dated 11 November 2005 and 22 March 2006 respectively. We will revert to the relevant terms of these agreements later.

[3] On 23 August 2005 the second appellant was placed under receivership by the debenture holder, Am Merchant Bank Bhd and Pricewaterhouse Coopers was appointed as the manager and receiver of the second appellant.

[4] The respondents were represented by their union, the National Union of

Hotel, Bar & Restaurant Workers, Peninsular Malaysia ('the union'). On 15 November 2005 the manager and receiver informed the union that due to the second appellant's financial position, it was no longer a feasible option for the second appellant to continue its hotel operations and to remain in the hotel industry. It has no alternative but to sell its assets and to carry out a termination exercise.

[5] The respondents were in due course served with notices of termination which contained therein offers to pay them specified sums of money as 'termination benefits and other payments' in accordance with the terms of their employment. The respondents acknowledged receiving the notices and payments offered to them.

[6] Nevertheless they remained unsatisfied and took their case to the Industrial Court claiming that they were dismissed without just cause or excuse, in breach of the collective agreement entered into between the second appellant and the union. In their claims, they sought to be reinstated without any loss of wages, allowances, service, seniority, privileges or benefits of any kind and/or such other order or alternative relief as the court deems fit and proper.

[7] The first appellant was added as a party by order of the Industrial Court.

[8] The Industrial Court, after a full hearing, dismissed the respondents claims against the appellants. The Industrial Court held that the second appellant had terminated the services of the respondents with just cause or excuse. In respect of the first appellant the Industrial Court held that it was not a party to the collective agreement and that the respondents were never employed by the first appellant and hence their services were never terminated by the first appellant.

[9] The respondents, being aggrieved by the decision of the Industrial Court, applied to the High Court for judicial review pursuant to O 53 of the Rules of the High Court 1980 ('RHC') seeking the following orders:

(a) an order of certiorari to quash the award of the Industrial Court;

(b) a declaration or order that the respondents were dismissed without just cause or excuse and that they be reinstated to their former positions in the hotel, now being operated by the first appellant without loss of salary and all other benefits or compensation in lieu thereof and backwages to be paid by the first and/or second appellants;

(c) in the alternative, an order to remit the respondents' case to the Industrial Court to be heard de novo by a different chairman; and

(d) in the alternative, an order of mandamus compelling the Industrial Court to order that the respondents be reinstated to their former positions in the hotel without loss of salary and all other benefits or compensation in lieu thereof and backwages to be paid by the first and/or second appellants.

[10] The Kuantan High Court dismissed the respondents' application for judicial review with costs. On appeal, Court of Appeal allowed their appeal with costs, quashed the award of the Industrial Court, set aside the decision of the High Court and ordered that compensation and backwages be paid to the respondents, in lieu of reinstatement. The Court of Appeal made a further order that the matter be remitted to the Industrial Court for assessment of compensation and backwages to be paid by the first appellant. The appellants then applied for leave to appeal to this court against the decision of the Court of Appeal.

[11] On 28 August 2013 this court granted leave to the appellants to appeal against the decision of the Court of Appeal on the following questions of law:

(a) whether an article of a collective agreement that seeks to result in the automatic transfer of employees from the present employer to another non-party of the collective agreement, without the consent of the non-party of the collective agreement and/or employees, can be enforceable under the Industrial Relations Act 1967 and/or Industrial Law?; and

(b) whether s 17 of the Industrial Relations Act 1967 applies only to ensuring the continuity of the terms and conditions of a collective agreement in the context of successors, assignees or transferees or can it apply to mandate a purchaser of asset and/or business to continue to employ the former employees of the asset/business seller?

[12] It is therefore imperative to look at the reasonings of the courts below in arriving at their decisions before addressing the issues raised in the appeal before us. The central dispute between the contesting parties is on the proper construction of article 2.4 of the collective agreement vis-a-vis the facts adduced before the Industrial Court. Article 2.4 of the collective agreement states:

> 2.4 In the event of the Hotel changing its name or of ownership or merging with other Companies, the validity of this Agreement shall continue to apply and that all the employees shall continue to remain in service to enjoy the same entitlements as contracted for.

The first appellant is not a party to the collective agreement.

Before the Industrial Court

[13] After a full trial and evaluation of the evidence before it the Industrial Court came to the following findings of facts:

(a) it was the second appellant which employed and terminated the services of the respondents;

(b) the first appellant was not the employer of the respondents;

(c) the first appellant undertook to pay the termination benefits of the respondents pursuant to cl 9 of the SPA;

(d) all the respondents had accepted the termination benefits;

(e) there was no evidence that the second appellant had changed its name, ownership or merged with another company;

(f) as at the date of the award Pricewaterhouse Coopers remained as the receiver and manager of the second appellant;

(g) it was the said receiver and manager which sold the land and assets of the second appellant;

(h) the second appellant continued to exist although under the receivership;

(i) the second appellant's business was sold to the first appellant as a going concern;

(j) the first appellant entered into a new management contract with the Hyatt Hotel Management Ltd;

(k) the SPA did not contain a provision for the transfer of the employees of the second appellant to the first appellant;

(l) the second appellant sold its land and assets due to financial difficulty;

(m) there was no discrimination between the unionised and non-unionised staff in the termination exercise; and

(n) there was no privity of contract between the first appellant and the respondents.

[14] Based on those findings the Industrial Court held that the second appellant did not breach article 2.4 of the collective agreement. The Industrial Court found that the second appellant had acted in accordance with the Code of Industrial Harmony and established principles of law and was justified in terminating the services of the respondents as it had ceased its hotel business. In the result, the Industrial Court dismissed the respondents' claims against the appellants.

Before the High Court

[15] The High Court agreed with the findings of facts by the Industrial Court and its conclusion that the second appellant had terminated the respondents' services with just cause or excuse and that such termination was not in breach of article 2.4 of the collective agreement. The High Court reiterated the principle that in a judicial review application the court's function is to decide whether the decision making process was done in accordance with the law. Judicial review is not an appeal from a decision but a review of the manner in which the decision was made and that the High Court is not entitled in an application for judicial review to consider whether the decision itself, on the merits of the facts was fair and reasonable: (*Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417). The High Court ruled that the Industrial Court had not exceeded its jurisdiction and that it has no basis to intervene or set aside the decision of the Industrial Court.

Before the Court of Appeal

[16] The Court of Appeal allowed the appellants' appeal, among others, on the following grounds. Firstly, it was inappropriate for the courts below to apply the strict and legalistic approach in construing articles 1 and 2.4 of the collective agreement in its literal meaning. It preferred the reasonable and pragmatic approach taken by the Court of Appeal in *Kesatuan Pekerja-Pekerja Perkayuan v Syarikat Jengka Sdn Bhd* [1996] 3 MLJ 464; [1997] 2 CLJ 276 which held that ordinary rules of construction which necessarily involve a rather strict and legalistic approach, did not apply when interpreting a collective agreement, which is not a commercial agreement but a document dealing with far more basic issues pertaining to the livelihood of workmen. Parliament, in recognising the importance of providing a conducive working environment and promoting a harmonious relationship between the employer and the employees or workmen, had enacted s 30(5) of the Act which enjoins the court to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

[17] Secondly, the courts below failed to appreciate that when construed as a whole, the SPA entered into between the first and second appellants in fact and law resulted in a change of the ownership of the business of the Hotel within the meaning of article 2.4 of the collective agreement. The word 'Hotel' in article 1 of the SPA refers to 'Kuantan Beach Hotel Sdn Bhd trading as Hyatt Regency Kuantan'. By applying the broad and pragmatic approach the Court of Appeal concluded that the word 'Hotel' refers also to the business of the second appellant. The Court of Appeal had scrutinised the terms of the SPA and the supplemental agreements in their entirety vis-a-vis the evidence adduced before the Industrial Court and came to the conclusion that the hotel

business of the second appellant was transferred as a going concern to the first appellant. As such there was in law and in fact a change of ownership within the meaning of article 2.4 of the collective agreement. There was continuity in the business of the hotel after the first appellant bought over the property from the second appellant, a fact which was confirmed by Dato' Anuarul Aini bin Mohd Perai, who testified for the first appellant. The hotel never ceased its operations and continued to be managed by the same management company under a new contract. Thus, the Court of Appeal held that the decision of the High Court in affirming the decision of the Industrial Court that there was no change of ownership was irrational.

[18] Thirdly, the courts below erred in holding that the first appellant was not bound by the collective agreement as it was not a party to it. The respondents contended that the first appellant was bound by the collective agreement as the successor assignee or transferee of the second appellant. The Court of Appeal held that the first appellant was bound by the collective agreement for two reasons:

(a) the first appellant had agreed to take over any liability of the second appellant by virtue of cl 9 of the SPA; and

(b) the first appellant was the 'successor assign or transferee' of the second appellant within the meaning of s 17(1) of the Industrial Relations Act 1967 ('the Act'), relying on the decision of this Court in *Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd & Anor* [2001] 3 MLJ 705; [2001] 3 CLJ 547.

DECISION OF THIS COURT

[19] The circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. In *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 it was said that judicial review is not an appeal but a review of the manner in which the decision was made and the High Court is not entitled in an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable.

[20] In *Non-Metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Firebricks Sdn Bhd* [1976] 2 MLJ 67 the Federal Court had made it clear that the Industrial Court was charged with findings of fact and 'unless it can be shown that the evidence was so much one way that no reasonable tribunal could have disregarded it, it is not possible to interfere with its findings of facts'.

[21] The court may intervene on the ground that the decision maker had

acted on no evidence or had come to a conclusion which on evidence it could not reasonably come: *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204; [1988] 1 CLJ (Rep) 183; *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320. It is now settled law that the courts may review the decision of an inferior tribunal on the grounds of illegality, irrationality and possibly proportionality: *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, thus permitting the courts to scrutise the decision not only for process but also for substance. In *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288 this court however clarified that not every case was amenable to judicial review pursuant to the principle in *R Rama Chandran's case*. It should only be invoked in appropriate cases. There may be cases in which for reasons of public policy, national interest, public safety or national security it may be wholly inappropriate for the courts to attempt any substitution of views: *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789.

[22] A decision of an inferior tribunal is amenable to judicial review where the facts do not support the conclusion arrived at by the tribunal or the findings of the tribunal had been arrived at by taking into consideration irrelevant matters or disregarding relevant matters: *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1.

[23] It is not in dispute that the second appellant had not changed its name or merged with another company. The central issue is whether the 'Hotel' has changed 'ownership' within the meaning of article 2.4 of the collective agreement.

[24] The word 'Hotel' in article 2.4 refers to 'Kuantan Beach Hotel Sdn Bhd trading as Hyatt Regency Kuantan' which is identified in article 1 as a party to the collective agreement.

[25] Article 2.4 of the collective agreement clearly states that in the event the Hotel changed ownership, the collective agreement remains valid and all the employees shall continue to remain in service to enjoy the same entitlements as contracted for.

[26] The problem arose when the respondents' employer, the second appellant, terminated the respondents' services after selling its land and the building thereon, including the hotel and other assets, to the first appellant. The respondents' claimed that they were dismissed without just cause or excuse and should be reinstated.

[27] The second appellant contended that it was not liable under article 2.4

of the collective agreement as it had not changed ownership. It continued to exist although placed under receivership. The respondents contended otherwise. The Industrial Court and the High Court decided in its favour. On appeal, the Court of Appeal allowed the respondents' appeal, set aside the orders of the courts below, holding that the respondents were dismissed without just cause or excuse.

[28] Clearly, the disagreement between the parties is over the construction of article 2.4 of the collective agreement. The Court of Appeal and the courts below, that is the High Court and the Industrial Court, arrived at different conclusions on the same facts before them because they differed in their approaches in the interpretation of the collective agreement.

[29] The High Court adopted a strict and legalistic approach and construed article 2.4 of the collective agreement in its literal meaning. The Court of Appeal held that it was inappropriate to apply the ordinary rules of construction in interpreting article 2.4 of the collective agreement, which is not a commercial agreement but a document governing the relations between the employer and the employees or workmen.

[30] The Industrial Relations Act 1967 was specifically enacted by Parliament to regulate the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade dispute and matters arising therefrom: See long title to the Act.

[31] Thus, in s 30(5) of the Act the legislature in plain and simple language enjoins that the Industrial Court, in making the award 'shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form'.

[32] Our courts had, on numerous occasions expressed the views that such awards must be decided in accordance with s 30(5) of the Act. Ordinary rules of construction do not apply in interpreting the terms of a collective agreement: See *Kesatuan Pekerja-Pekerja Perkayuan v Syarikat Jengka Sdn Bhd*. In *Tanjong Jara Beach Hotel Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers Peninsular Malaysia* [2004] 4 CLJ 657 the Federal Court once again emphasised that the Industrial Court in applying its powers under s 30(5) of the Act has to bear in mind the underlying objectives and purposes of the Act, which is a piece of legislation to ensure social justice for both employers and employees and to advance the progress of industry by bringing about harmony and cordial relationship between the parties; to eradicate unfair labour practices; to protect workmen against victimisation by employers and to ensure termination of industrial disputes in a peaceful manner. Similar views

had been echoed in the past: see for example, *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and Another Appeal* [1995] 2 MLJ 753, *Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489; [1996] 4 CLJ 747, *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129; [2002] 3 CLJ 314. Thus technical rules such as estoppel, limitation, laches, acquiescence (unless otherwise provided in the Act) have no place in industrial adjudication and they should not be allowed to be invoked to defeat claims which are just and proper: see *Nadarajah & Anor v Golf Resort (M) Bhd* [1992] 1 MLJ 506.

[33] We agree with the Court of Appeal that there was in fact a change of *ownership* of the Hotel, within the meaning of article 2.4 of the collective agreement pursuant to the sale of the Hotel by the second appellant to the first appellant. As a result of the sale the hotel business, which was the core business, if not the sole business of the second appellant was transferred and taken over by the first appellant. Article 2.4 clearly states that in the event of a change of ownership, the collective agreement remains valid and shall continue to apply and that all the employees shall continue to remain in service to enjoy the same entitlements as contracted for. The Hotel did not cease operations after being taken over by the first appellant. To ensure continuity of the Hotel business, the first appellant entered into a new management agreement with Hyatt Hotel Management Ltd on 27 January 2006, which was one day before the second appellant terminated its management agreement.

[34] It is provided in cl 12(a) of the SPA that the vendor (second appellant) shall give vacant possession of the property to the purchaser (first appellant) on the completion date and in that event the purchaser shall take over the whole hotel operations and shall bear all expenses and enjoy profits from the completion date. It is therefore obvious that the hotel business of the second appellant was transferred and taken over by the first appellant as a going concern. In a transfer as a going concern the business remains the same but in different hands: see *Melon and others v Hector Powe Ltd* [1981] 1 All ER 313 which was referred to in *Abdul Aziz bin Atan & 87 Ors v Rengo Malaysia Estate Sdn Bhd* [1986] 2 MLJ 98; [1986] CLJ (Rep) 41. The High Court construed article 2.4 of the collective agreement in its literal meaning when it held that the second appellant had not changed ownership and continued to exist by the same name even after selling its property to the first appellant. It did not consider the change of ownership of the hotel as a change of ownership within the meaning of article 2.4 of the collective agreement. Such an interpretation of article 2.4 would not be in accord with s 30(5) of the Act. It must not be forgotten that the respondents, who were employees of the second appellant, were actually employed to work at the hotel which had been taken over by the first appellant.

[35] By cl 9 of the SPA the first appellant has contracted to assume the rights and liabilities of the second appellant.

Section 17 of the Act

[36] Section 17 of the Act states:

> (1) A collective agreement which has been taken cognizance of by the Court shall be deemed to be an award and shall be binding on—
>
> (a) the parties to the agreement including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and
>
> (b) all workmen who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates.

[37] Section 17 of the Act had been judicially considered by this court in *Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd & Anor* [2001] 3 MLJ 705; [2001] 3 CLJ 547.

[38] In that case the collective agreement in question was between Kesatuan Kebangsaan Wartawan Malaysia (first appellant) and Sin Poh (Star News) Amalgamated Malaysia Sdn Bhd ('Sin Poh') which was given the permit to publish the newspaper, Sin Chew Jit Poh Malaysia. On 3 September 1987 Sin Poh was placed under receivership. On 28 October 1987 the minister cancelled the permit. On 23 March 1988 the minister issued the permit to publish the same newspaper to Syarikat Pemandangan Sinar Sdn Bhd (first respondent), which then reemployed 85% of Sin Poh's employees. On 6 April 1988 the Receiver and Manager of Sin Poh entered into a Sale and Purchase Agreement with Syarikat Rimbunan Hijau Estate Sdn Bhd (second respondent) and sold all the physical assets of Sin Poh to the latter.

[39] The first and second respondents were not parties to the collective agreement. The Industrial Court held that they were successors assignees or transferees of a party to the collective agreement and bound by it. The High Court agreed with the Industrial Court. The Court of Appeal held otherwise. Leave to appeal to the Federal Court was granted as to whether the first and second respondents were successors, assignees or transferees of Sin Poh under s 17(1)(a) of the Act. The Federal Court held that the first and second respondents were bound by the collective agreement as successors, assignees or transferees of Sin Poh. The Federal Court reasoned that the provision of the Act (ie s 17(1) 'cuts across the law of contract' and that its rationale is one of 'continuity of the collective agreement' from the original parties and members of the union to their successors, assignees or transferees in order to ensure that the rights and obligations of the parties are preserved by those taking over.

[40] The first appellant's contention that it was not bound by the collective agreement was therefore without any merit. In any event and independently of s 17(1) of the Act, the first appellant which had agreed by cl 9 of the SPA to assume the rights and liabilities of the second appellant cannot now say that it is not bound by the collective agreement.

[41] It appears that the two questions of law posed to this court are basically questions relating to the construction of an article in the collective agreement and a provision in a statute. The first question is on the construction of article 2.4 of the collective agreement which had to be decided on the peculiar facts adduced before the Industrial Court. The answer to the question would be dependent on the facts of the case. In the case before us there was a change of ownership within the meaning of article 2.4 of the collective agreement. Thus the parties are bound by it.

[42] The second question is on the construction of s 17(1)(a) of the Act, which had been judicially considered by this Court in *Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd & Anor*. In that case, the first and second respondents were not parties to the collective agreement, but were nevertheless held to be bound as the successors, assignees or transferees of the party to the collective agreement within the meaning of s 17(1)(a) of the Act. The ultimate decision of whether the purchaser is a successor, assignee or transferee within the meaning of s 17(1)(a) of the Act would be dependent on whether it can be established that the purchaser is a successor, assignee or transferee. In the instant appeal there is no doubt that the first appellant was the successor, assignee or transferee of the second appellant in the context of s 17(1)(a) of the Act. Accordingly we dismiss the appeal by the appellants with costs.

[43] We note that the Court of Appeal had ordered that the case to be remitted to the Industrial Court for assessment of compensation and backwages due to the respondents in lieu of reinstatement without taking into account that they had accepted the termination benefits offered by the second appellant. Therefore whatever amount of termination benefits which had been paid and accepted by the respondents shall be taken into account in assessing the amount of compensation and backwages due to them.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor